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PRESUMPTION AND INFERENCE.

In a recent issue of the Central Law Journal we attempted to distinguish between presumption and inference. We there referred to a *presumption* which is said to arise from proof of ownership of an automobile and that the driver was in the employ of the owner. This so-called presumption was referred to as such because it has so been held by some of the courts. In the opinion of the writer such holdings are wrong. Proof of these facts constitutes evidence from which inference may be drawn that the driver was about his employer's business. In jury trials, inferences can be drawn only by the jury. Hence, when such evidence is given in behalf of the plaintiff, the case must be submitted to the jury, in so far as this question is involved. If a *presumption* arose from evidence of such facts, it would be proper, even necessary for the trial court to so instruct the jury. If a presumption does not so arise, and such evidence is circumstantial for the jury to consider, such an instruction would be erroneous as isolating a part of the testimony and unduly commenting on and stressing the same. It would also have the effect, at least to some extent, of invading the province of the jury, by practically assuming that the testimony from which the inference *may be* drawn is true.

Presumptions are rules of law. They may be rebuttable or not. Being rules of law, they are properly so treated in instructions to the jury. Most of them depend upon and relate to facts, in any given case. For the application of the rule of law that a person under seven years of age cannot commit a crime, the fact must be shown that a child charged with the commission of a crime is within the prescribed age. This presumption, this rule of law, is absolute in its effect. The rebuttable presumption that a person between seven and fourteen years of age is incapable of committing a crime depends likewise upon facts. Unless it is proved that such a person charged with crime, is as matter of fact capable of appreciating the character of his act, then the presumption applies, and is absolute. If this is proved, the presumption does not apply; and whether or not it is proved is for the jury to decide.

It is the utmost importance that facts which some rule of law declares gives rise to a presumption be not confused with facts which justify an inference as to the existence of another fact. The latter constitute circumstantial evidence.

Circumstantial evidence is any evidence which is not direct and positive. For instance, a material fact in a case is required to be established to the satisfaction of the court or jury. There is no one who is able to testify from personal knowledge that such fact exists. Resort is had to the proof of collateral facts, when taken together form a chain of evidence, which, being weighed in the scale of reason, aided by the light of our common knowledge and experience, satisfies the conscience, and convinces the judgment that such main fact exists.

In the case of State v. Swarens, 241 S. W. 934, decided by the Supreme Court of Missouri on May 22, 1922, that court reversed a long line of decisions, extending over a period of more than forty years, and held that proof of possession by the accused of property recently stolen raises no presumption of law as to the guilt of the accused, but is only a fact or circumstance from which the guilt of accused can be inferred as matter of fact. For many years the courts of Missouri had been holding that possession by the accused of recently stolen property raised the presumption that the accused had stolen it. Juries were instructed accord-

ingly, and thus the province of the juries invaded by the courts because of failure to distinguish between facts giving rise to a presumption and facts which constitute circumstantial evidence. In the opinion in that case it is said: "The jury should be allowed to try the facts. . . . We should no longer direct trial judges to substitute themselves for the jury on important issues of fact in cases of this kind. That is what this court has been doing."

Another illustration may be taken from the following rule, stated in Shearman & Redfield on Negligence (6th ed.), vol. 1, par. 158: "When the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant."

Some courts, seeking to follow this rule, have held that from proof of ownership arises a presumption that the thing was in the possession and control of the owner. Objection has been made that this has the effect of founding presumption on presumption, e. g., in case of an automobile driven by a person other than the owner, that the driver was in the employ of the owner, and was engaged in the scope of his employment. However, even treated as a presumption, there is only one, and that is, that the automobile was in the possession and control of the owner.

But this evidence does not give rise to a presumption. From evidence of ownership the jury may infer, *if they believe the witnesses,* that the thing causing the injury was in the control of the owner. This conclusion the jury may reach, "aided by the light of our common knowledge and experience" that property is generally in the possession and control of the owner. If there is cause for not believing the witnesses, the jury are not required to so conclude. Thus, the facts are left to the triers of facts to determine.

Some courts, erroneously treating this evidence as raising a presumption, hold that when the defendant owner produces direct or positive evidence that the vehicle was not in his control, the "presumption" fades out of existence and the plaintiff's case falls as matter of law, unless he comes forward with some evidence in rebuttal. This takes from the jury the right to judge of the credibility of the witnesses. Further, it seems to unduly accent the importance and value of so-called direct or positive testimony, which is not the best class of evidence, generally speaking.

Thus, considering this evidence as raising a presumption, instead of treating it as circumstantial evidence, which it clearly is, the courts have run the law into great confusion. Properly treated, it creates no confusion, and conflicts with no established rules of law.

Another recent case of importance in this respect is Rockwell v. Standard Stamping Co., 241 S. W. 979, decided by the St. Louis Court of Appeals. In a very able and clearly stated opinion written by Commissioner Biggs, that court holds that proof of ownership of a business truck, bearing the name of the owner, is *prima facie* evidence that the truck at the time of an accident, was being driven by a servant of the owner acting for the owner. Judge Biggs does adhere to the "presumption" theory said to arise from proof of ownership, but uses this language: "Ownership implies possession and control. Especially is this true in a case where as here the car is a business vehicle being operated during business hours."

We submit that all this evidence is circumstantial, which no amount of testimony in behalf of defendant can keep from the jury. That the truck was a business vehicle operated during business

hours constitutes merely additional circumstantial evidence tending to show that the vehicle was being used in defendant's business at the time in question.

NOTES OF IMPORTANT DECISIONS.

THE DOCTRINE OF IMPUTED NEGLIGENCE.—An interesting discussion of the evolution of the doctrine of imputed negligence, discussing the gradual overthrow thereof, is found in the recent opinion of the Supreme Court of Indiana in the case of Union Traction Co. of Indiana v. Gaunt (135 Northeastern 486). In that case Travis, J., discussed the subject as follows:

"The evolution of the doctrine of imputed negligence has in recent years been such as to be almost revolution against the doctrine. The doctrine of imputed negligence as found in the jurisprudence of the states of the United States, as taken from the British courts, is viewed by text writers as being no more than an application of the old Roman doctrine of 'Identification,' which was that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of its managers who in any manner contribute to an injury inflicted upon such passenger by the negligence of a stranger. The doctrine was established in England in 1849 by the case of Throgod v. Bryan (8 C. B., 115), which held that the negligence of a driver of a vehicle would be imputed to a passenger even though such passenger had no control. This doctrine was first adopted in the United States in 1878 by the State of Wisconsin (Prideaux v. Miner, 1 Point, 1878, 43 Wis., 513, 28 Am. Rep., 558) and was thereafter adopted by many other states, the most of which have since rejected it, and Wisconsin is one of the latest states to reject the doctrine (Reiter v. Grober, 1921, 173 Wis., 493, 181 N. W., 739). The doctrine has even been repudiated in England, and the only jurisdiction of the United States that has not repudiated it is the State of Michigan (The Bernina, 1887, C. A., L. R., 12, Prob. Div., 58; Jewell v. Rogers Tp., 1919, 208 Mich., 318, 175 N. W., 151). The extension of the doctrine of identification as it existed in Roman jurisprudence has been practically unanimously refused and denied in the United States (Little v. Hackett, 1886, 116 U. S., 366, 6 Sup. Ct. 391, 29 L. Ed., 652).

"Under the doctrine as now understood, in the case at bar, the child, had it survived, would have had a good right of action against appellant, notwithstanding the negligence of the driver of the conveyance contributed thereto, the child being without fault. The right of the father to damages for the loss of services of his child is entirely separate and distinct from the right of the child to recover for such injuries (1 Schouler, 6th ed., sec. 757). When, however, a non-negligent parent sues for loss of services on account of the death of his minor child, occasioned by the negligence of a defendant, and the concurrent or contributory negligence of another in no way privy by contract or agency with such father, the courts are called upon to decide which of two parties, one innocent and the other negligent, should be preferred. There seems no logic or justice in invoking the fiction of imputed negligence in such a case, and the plaintiff ought to recover.

"It will be noted from the above that the doctrine of imputed negligence is fast losing ground, and that a majority of the appellate courts of the United States have repudiated it. And, in the light of the movement in the United States to bring about uniform laws in all of the states, it is to be hoped that the jurisdictions in the minority which still cling to the main doctrine of imputed negligence will accept the legal position of the majority, and that imputed negligence will find footing only in cases where an express or unequivocal agency exists."

STATUTE FORBIDDING ISSUANCE OF STOCK UNTIL PAR VALUE PAID IN MONEY NOT VIOLATED BY TAKING NOTE IN PAYMENT—A statute forbidding the issuance of corporate shares until the full par value in money has been received, is held in Loane Tree Bank v. Timmerman, 188 N. W. 856, decided by the Supreme Court of Iowa, not to be violated by taking a note in payment of a stock subscription, although the corporation discounted the amount immediately after receiving it.

"It is the contention of the appellant that the fact that the corporation receiving the defendant's notes for the stock and immediately exchanging them with plaintiff for Liberty Bonds at par when such bonds were worth only 90 per cent. of their face is in effect a sale of the shares at a discount, and therefore a violation of terms of Code Supplement, § 1641b and 1641d, which forbid the issuance of corporate shares only upon payment of the full par value thereof in money, except upon leave so to do obtained from the state executive counsel. The objection is not well taken. By its express terms the statute so relied upon is made applicable only to corporations "organized under the laws of Iowa," but even if it be thought broad enough to cover the case of a foreign corporation doing business in this state, I cannot be held that the taking of the promissory note of a stock subscriber in payment fo his subscription to the corporate shares violates such statutory regulation. This question was before us in Bank v. Fulton, 156 Iowa, 734, 137 N. W. 1019, and there decided against the appellant's contention. Nor can we see on what sound theory a note which is valid under the doctrine of the Fulton Case just cited can be said to become invalid by the act of the corporation or its agent in negotiating it at a discount."

THE TRIAL LAWYER*

The most valuable right secured to litigants by the organic law is the right to appear by Counsel. Without this great right unimpaired, all of the other rights secured by that instrument diminish in importance and some of them dwindle into insignificance.

To appear as Counsel is the most responsible position which one man can occupy towards another, and this responsibility voluntarily imposed makes it the most honorable position which any lawyer can occupy. It imposes a confidence not found in any other relation of life; it challenges a fidelity and integrity of service whose limitations are circumscribed only by the high ethics of the noblest of professions.

The sphere of the trial lawyer is as broad as the activities of Government. He is the High Priest of Justice and Justice is the purpose and the end of Government. There is no field of human endeavor which affords so attractive a panorama for unselfish service; holds out so inviting a prospect to industrious ambition as the field of service of the trial lawyer.

In speaking of the trial lawyer, of course, I do not mean the jury fixer and suborner of perjury. He is not a lawyer, he is a criminal. But I am speaking of the lawyer who knows the rights of man and how to go into court and enforce and defend those rights and has the courage to do so. The trial lawyer thus considered, is not only at the head of his profession, but is a guardian of the rights of man and is an agency shaping the destinies of nations. Jeremiah Black said that a mere lawyer was a mere jackass.

A finished trial lawyer has been, is, and will continue to be the best and greatest product of intellectual attainment. The greatest necessity of man is Government —Government which leaves him free to develop his faculties and his functions. The purpose of Government is not to confer or enlarge the rights of man, but is to secure and preserve the rights of man. There has always been a conflict between the Government of the people and the people, in that, as the power of the Government has increased, the liberty of the people has decreased. In this conflict, the politician and the so-called statesman have been found on the side of the Government, while every great trial lawyer in the history of the world has been found on the side of human liberty, on the side of the people in this conflict, as between the citizen and his Government. The politician and the stateman have always dealt with freedom and liberty in the abstract and always sought to strengthen the Government, while to the great trial lawyers of the world, the freedom and liberty of the people has been a living thing, dealt with in the concrete. Out of this struggle between usurpation and tyranny on the one hand and liberty and humanity on the other, has been evolved the substantive law defining rights of the citizen and the procedure which the law gives to secure or to enforce these rights.

The right of the citizen to appear by counsel seems to have been unlimited in some jurisdictions, denied in others, and regulated in others, as with us. Judging from the speeches of Demosthenes, Lysias, Aeschines, and others, it seems that the right of counsel in Greece to appear was unlimited, for we find in the speeches that they not only argued the facts, but while so doing, testified to facts. The same lax rule seems to have prevailed in Rome. I shall speak of this rule in reference to England and America before I shall have finished.

The fruit-bearing speeches of the world have been the great speeches of the lawyers of the world, and were law speeches when they were made. The greatest oration of the greatest orator of all times was

*An address delivered June 1, 1922, to the Arkansas State Bar Association, at Little Rock, by T. H. McGregor, Houston—Austin, Texas.

the oration of Demosthenes on the "Crown." This was a law speech made in a criminal case, pure and simple, and it has neither been excelled nor equaled in any other field of oratory. You will recall the facts in the celebrated case. Ktesiphon, moving in the theatre that a proclamation issue to crown Demosthenes with a golden crown at the Dionysian festival for the services which Demosthenes had rendered the Greek people, naming such services. Aeschines, the leader of the Macedonian party, preferred charges against Ktesiphon on account of this act, and which were embodied in an indictment which would be good now, as drawn according to the provisions of the Common Law. It gave the date of the offense, fixed its venue, described it with legal certainty and endorsed the indictment with the names of witnesses. It charged that it was against the law to incorporate in the public archives a falsehood. That it was unlawful to crown any man who still held office and who had to make an accounting. That Demosthenes was custodian of the Theoric fund and had such report to make. It further charged that it was unlawful to crown anybody at the Dionysian festival. It charged that the recited services rendered by Demosthenes were false and to incorporate them in the public archives was unlawful. On this indictment issue was joined in one of the greatest law suits in the history of the world, with the greatest orator for all time representing the defense. Aeschines was not after Ktesiphon, but he sought through his conviction to destroy Demosthenes. This is perfectly apparent from the exordium of that great speech. It was really a case against Demosthenes. He was not only defending himself against Aeschines, but it was a case of Athens against Macedonia, of Liberty against Philip, of civilization against barbarism, constituting, as I stated, one of the greatest law suits in the history of the world. The success of that law suit and the high position attained by Demosthenes and held through all these centuries demonstrates that no other profession or calling furnishes an avenue to vaulting ambition as does the profession of the trial lawyer. In this case, Aeschines was a great orator, but Demosthenes was more than a great orator, he was a great orator and a trial lawyer. It is said that when Aeschines finished his speech, the Athenians said of him "How he speaks," but when Demosthenes finished one of the great Philipics, the populace shouted, "Let us go against Philip." This oration on the crown demonstrates every essential in the formation of the highest and last type of the trial lawyer.

Demosthenes was mentally and probably physically a rare combination of the Spartan and Athenean. His great speeches indicate his mental and moral courage, expressed in that exquisite diction which gives them the attic tone. He has not been the prototype of as many subsequent orators, as has been Cicero. The only American who suggests him is John C. Calhoun.

The law has been and always will be a jealous mistress. This fact probably accounts both for the difference and the distance between Demosthenes and Cicero. Cicero's versatility adorned his diction and gave it an ornateness which is not found in the efforts of those who went before him, nor of his contemporaries. He was a poet, a philosopher, an essayist, a naturalist, a stateman and an orator, but it was none of these which gave him claim on posterity. These were incidents to the grandeur of his intellect but it was his efforts as a trial lawyer which secured for him the second position in the trial lawyer's hall of fame. The prosecution of Cataline was as much a criminal prosecution as was the prosecution of Veres, and his defense of Milo is literally and accurately the isolated effort of a trial lawyer. These three speeches, the defense of Milo,

the prosecution of Veres, and the prosecution of Cataline compose the literary and legal laurels which constitute the crown of his greatness. He has had many imitators who have honored his style and proved his excellence, but few have approached him and none have equalled or excelled him.

For felicity of expression, for terseness and aptness of statement, for tact in action, and for courage, the Apostle Paul as a trial lawyer stands in a class by himself. The record of his trials from the time he was rescued from the mob in the Temple until he was sent to Rome, is the briefest, most accurate and yet most comprehensive record extant. You will recall that when he was taken from the mob by Lysias, he was asked by Lysias if he was not a certain Egyptian, then an outlaw. He at once assumed an aggressive defensive, which he maintained throughout the entire proceeding, indicating in all things that he had not sat idly at the feet of Gamaliel. Paul states his whole case to Lysias in one sentence, considering the charges which had been brought against him. He said: "I am a man which am a Jew, of Tarsus, a city of Cilicia, a citizen of no mean city." Thus Paul's statement challenged the attention and won the confidence of the commander and he permitted Paul to speak to the mob, which he did in the Hebrew tongue.

The opening sentence of Mark Anthony's speech over the dead Caesar is known of all men where the English language is spoken: "Friends, Romans, Countrymen! Lend me your ears!" This statement, while it has never challenged the criticism of any man, is not as strong as that of Paul, with which he began his address to the Jewish mob, when he said: "Men, Brethren and Fathers, hear ye my defense which I make unto you." And the yet greater statement, startling in its simplicity, wonderful in its appropriateness, in which he says: "I am verily a man, which am a Jew, born in Tarsus, a city in Cilicia, yet brought up in this city at the feet of Gamaliel and taught according to the perfect manner and law of the fathers and was zealous towards God as ye all are this day." Then step by step he proceeds to the climax of that speech until by a reference to the Gentiles he throws his audience into the delirium of anarchy and it again becomes a mob. Then he is again rescued by the commander, who, angered by the disturbance he had caused, ordered that he be bound and scourged. When he had been bound and the soldier was about to carry out the commander's instruction, Paul said to him: "Is it lawful to scourge a Roman citizen uncondemned?" Paul knew that it was not, and the soldier knew the punishment for such an unlawful act. He desisted and reported Paul's statement to Lysias. Lysias sent for Paul and asked him if he were a Roman citizen. Paul answered that he was and then Lysias said to him: "For a great sum bought I this freedom." Paul, knowing the entire field of the Roman law, and knowing that a natural freeman was the highest type of Roman citizen, said to Lysias: "But I was free born." Then Lysias called the chief priest and all the council to appear and set Paul down before them and when Paul addressed them, the high priest, Ananias, commanded them that stood by him to smite him on the mouth; then said Paul unto him: "God shall smite thee, thou whited wall; for sittest thou to judge me after the law and commandest me to be smitten contrary to the law?" And they that stood by said: "Revilest thou God's high priest?" Then said Paul: "I wist not, Brethren, that he was the high priest, for it is written 'Thou shalt not speak evil of the ruler of thy people.'" This exhibition and language on the part of Paul demonstrates in the last degree wonderful courage and his mastery of the law and his knowledge of the duties of the judge and of his own rights. Then, with a tact and an adroitness which are always essential to a trial lawyer, he saw that he had to depend on himself and not upon the fair-

ness of the court which was trying him, and he injected a new issue into his defense, raised the question of the immortality of the soul and precipitated a controversy between the Pharisees and the Sadducees and thereby escaped the pre-determined judgment of this unfair court.

Then Lysias sent him to Felix at Ceasarea. Then the high priest and elders, with their orator, Tertullus, went down to prosecute Paul before Felix. The statement of the case by Tertullus and Paul's reply thereto indicate the great difference and intellectual distance between these two men. The one was an orator—prolix, truculent and insinuating. The other was a lawyer—bold, direct and clear. Then Festus comes, and like a cowardly judge, urges Paul to return to Jerusalem to be judged, and again Paul invokes the law by saying: "I appeal to Caesar." Then comes the hearing before Agrippa and you remember how Paul began that hearing with an ingratiating statement that is remarkable in every respect: "I think myself happy, King Agrippa, because I shall answer for myself this day before thee, touching all of the things whereof I am accused of the Jews, especially because I know thee to be expert in all customs and questions which are among the Jews, wherefore I beseech thee to hear me patiently." Again, with a clarity of expression, a charm of directness and a completeness of detail, he makes the model statement of a defense in a criminal case.

This power to state a case is the greatest attribute of a trial lawyer. In this respect, a great American lawyer, a Jew, is said to have excelled any man of his time, and therefore suggests his illustrious prototype, the Apostle Paul. I heard Senator Vest say that before the war he was in the Supreme Court of the United States and heard Jeremiah Black argue a law suit. That when he had finished, the Court stated that it would take a recess for dinner. The lawyer on the other side arose and asked permission to state his case, saying that he could do so in a few minutes. The Court acceded to the request and the statement was made. Then Court recessed and Black and the Chief Justice left the Capitol together, with Vest following. Vest said that as they went down the Capitol steps, the Chief Justice put his arm around Black's shoulder and said to him: "Jerry, that little Jew stated you out of Court." That "little Jew" was Judah P. Benjamin, who afterwards became a member of the Confederate cabinet, an exile, a British citizen and died a Queen's counsellor.

The courageous attitude of Paul before the high priest and the council suggests to the mind of the student the great English lawyer, Erskine, in his defense of the Dean of St. Asaph before Justice Bullar. You will remember that in that trial the judge wanted to reform the verdict of a jury as to substance, and that Erskine protested almost to the point of being sent to prison and forced the judge to have the verdict recorded as returned, thereby preserving to the English-speaking people the sanctity of the verdict of a jury.

Erskine was unquestionably the greatest trial lawyer that the English-speaking people have produced, if not in fact the greatest trial lawyer in the history of the world. At his death the trial lawyers of England erected to his memory a statue in Lincoln's Temple to which Lord Campbell said that he would have been entitled had he rendered no other service to the human race except his defence of the right of trial by jury in the St. Asaph case. His various cases involving freedom of speech, freedom of the press and the rights of individuals have evoked the applause of the applauded of England, and caused Lord Brougham to say of him that but for his efforts, these great rights would still be denied and that the Inquisition would still exist in England.

In England the right to appear by coun-

sel existed only in misdemeanor cases prior to 1696. In all felony cases, and crimes against the Government, the defendant was denied a copy of the indictment against him, knowledge of who his accusers were, process for his witnesses and counsel to defend him. In 1696 this law was amended, giving the right of counsel and the other rights named to persons charged with treason and cognate crimes against the Government, but were still denied in other cases of felony. This fact is discussed by Erskine in his defense of Hadley, charged with an attempt to shoot the King.

The right to appear by counsel in all felony cases and the other rights named were not given in England until 1836. This may, in a measure, account for the slow development of the trial lawyers of England, and, I know, accounts for the constant discussion of human liberty by the great lawyers of England, in her State trials and in the House of Parliament. This is why Burke, at the trial of Warren Hastings, could say that the nisi prius lawyers of England did not understand the principles they were administering any better than a titmouse did the digestion of an elephant. England has been prolific of genius, and in every walk of life, yet her bad have sat in high places and her good have been the innocent and holy victims of the criminal in office. Bloody Jeffreys is doomed to eternal infamy because he consigned to martyred immortality Sidney and Russel, who were not permitted counsel. These conditions could not have existed had the trial lawyer of England been permitted to develop with equal pace the adjective with the substantive law. This procedure, or lack of procedure, constitutes the blackest page in English history. Yet out of it all came a line of great trial lawyers whose patriotism, courage and humanity will shine on forever. From an intellectual standpoint, probably the greatest trial in the history of the world was that of Warren. Hastings. McCauley's marvelous description of it persuades us that no one else could have described it except McCauley and the rich and luxuriant foliage of that wonderful description can not conceal the fruit of the greatness gathered there. There was Burke, of whom he said that for vastness of comprehension, richness of imagination, no orator, ancient or modern was superior to him. Fox was there, and the wonderful, radiating, scintillating Sheridan. Every lawyer who loves his profession and who thinks that there are limitations on the ambition of the trial lawyer, should read McCauley's description of the trial of Warren Hastings.

The right to appear by counsel in a Court is synonymous with and is a condition precedent to the enjoyment of human liberty. This is the underlying thought, the vital life-giving force of the American Declaration of Independence. On these principles the Revolution was fought, yet, when the Constitution of the United States was written at Philadelphia, great as the document is, it dealt with the rights of Government and overlooked the liberties of the people. While it was the product of patriots and statesmen, it lacked the handiwork of the trial lawyer. It lacked the preserving principle, crystallized into organic law, insuring the liberty of man; and Luther Martin, whom the vulgar called "Old Brandy Bottle," and whom Albert J. Beveridge describes as a superman, and George Mason, the great trial lawyers of that body, both refused to sign the Constitution because it was deficient in the respect noted.

Then came the Virginia Convention, composed of trial lawyers, whose souls were on fire with love of the rights of man and they wrote and demanded the first ten amendmentss to the Federal Constitution, securing the great rights, for which they had struggled, and without which the victory would have turned to ashes. These amendments were immedi-

ately adopted and they declare and secure the rights of the citizen against the tyranny, usurpation or encroachment of the Government.

In that convention was Patrick Henry, the John the Baptist, the condition precedent to the American Revolution. There was Pendleton, Edmond Randolph, George Mason, John Marshall, and all that galaxy of American greatness, which added the finishing touches to the American Constitution and made it in fact what Gladstone said it was—the greatest instrumen' ever struck off by the human mind at one sitting.

One of the most important trials in the history of the world, and unquestionably the most important in America, was that of Aaron Burr, because it was at that trial that John Marshall took the insidious doctrine of constructive treason by the throat and strangled it to death. He held that there was no such principle in the law of this country, and generations yet unborn will bless his name for this holding.

Albert J. Beveridge, in his "Life of John Marshall," describes this trial. Every American lawyer ought to have in his library Beveridge's "Life of John Marshall." He is the best equipped man in America to have written it. It constitutes the greatest contribution to the historical and legal literature of this country and will survive while the records of that period are preserved.

Reporting that trial, he demonstrates that he himself possesses all the essential elements of the great trial lawyer. While we read his description we wonder at the power of Luther Martin, the fascinating influence of Burr, the scintillating Botts, the luxuriant, exuberant and brilliant Wirt, but come back at last and stand uncovered in the presence of Marshall, the master spirit that controlled that trial.

It is a peculiar thing that in this case the same question came up on the recording of the verdict of the jury that had come up in the case of the Dean of St. Asaph. The jury returned a verdict that Burr had not been proven to be guilty and therefore the jury found him not guilty. His counsel wanted to change the verdict. Marshall quietly remarked that the verdict would be accepted as returned and that a judgment of not guilty thereon would be written.

Before John Marshall went on the bench he was justly regarded as one of the greatest trial lawyers of his time. This is abundantly established by the early cases in the Courts of Virginia, and of the Supreme Court of the United States.

Being a great trial lawyer himself, he knew the value of the trial lawyer to the court and he utilized him to the limit. His opinions are all lacking citation of authorities, almost destitute of anterior learning, but they are replete with the arguments of the greatest lawyers of his time.

The forensic theory of the law finds its best authority in the court decisions of this country, and especially in the dozen or more of the outstanding decisions of the Supreme Court of the United States, and they all rest on the great arguments of he great trial lawyers who appeared in those cases. It is in the courts after all that the law is established, declared, made certain.

In the case of Marbury vs. Madison it as first and finally decided that the Supreme Court had the right to review and to hold an act of Congress unconstitutional.

In McCullough vs. Maryland the doctrine of implied power was announced. In the Dartmouth College case, and in Fletcher vs. Peck the Supreme Court defined and sustained the inviolability of contracts. In Cohens vs. Virginia it was first held that the Supreme Court had appellate jurisdiction of appeals from State courts when the subject matter involved a Federal question and this was so, even though a State were a party to the suit. Gibbons vs. Ogden defines the field of interstate commerce and

declares the limitations set by the Constitution upon State Legislation under the commerce clause of the Constitution. These cases all support the forensic theory of the law and reflect the labors of the great trial lawyers who presented them to the Court. I want to add to this list of cases just one more, that of Ex-parte Milligan in presenting which Jeremiah Black said: "the pen that writes the judgment of the Court in this case will be mightier for good or evil than any sword that ever was wielded by mortal man."

It was in that case the Court preserved the right of trial by jury. While Black's great argument survives in the hearts and nds of the lawyers of this country, the right of trial by jury shall not fail.

These great cases involve the very fundamentals of our Government, and had any one of them been decided other than as it was decided, it might have affected the destiny of the human race. In every one of them the great lawyers who stood before the Court pointed the course the Court should go, representing not only their immediate clients, but all who should come after them.

hile the Supreme Court of the United States has been and is the greatest tribunal in the history of the world, it is because it has been and is sustained by the greatest galaxy of trial lawyers in the history of the world. This is relatively true of the Appellate Courts of the States.

As the Bar has been and is, so has been and is the Court. Wherever there has been a great judge in this country there have been great trial lawyers to aid and develop him, and on whom he leaned. I have intimately known two of the greatest judges who ever adorned an Appellate Bench in this country. One of them was Sherwood of Missouri and the other was Davidson of Texas. For thirty years Sherwood was sustained by the greatest Bar in the west and during all of that time he checked on it as on a great reservoir of learning and the Bar honored his drafts.

No Appellate Judge in America while on the bench ever enjoyed in as full an extent the confidence and affection of the Bar and profited as much by their labors as did W. L. Davidson of Texas. Nobody understood better than he the relations existing between Court and counsel, and this relation he judicially declared, when he said: "Attorneys are bound and will be held to obey legal orders of the Courts, yet the Court should invoke its judicial authority under the law and in obedience thereto. The relations of Court and attorney, Bench and Bar, are reciprocal and each in their proper sphere is clothed with powers, rights and privileges, which are to be recognized and respected alike by the Bench and Bar, and being carefully kept in view and followed as rules of action and conduct will avoid friction."

In addition to establishing these great principles of Government which I have discussed, the trial lawyers of the country, the country lawyers of America, have done more to preserve and to perpetuate these principles than any other agency.

The essentials of the real trial lawyer are few and simple: he must be sincere in purpose, courteous in conduct, and courageous in action. These constitute the trinity of his success. Without either he is a failure; with them all the goal that he may reach is limited only by his industry and the limitations of his profession.

The field of the trial lawyer in America has developed more great lawyers than it is necessary or appropriate for me to name, but it is not improper for me to say on this occasion that two at least of the world's great trial lawyers have been furnished by this State. U. M. Rose, in addition to his great legal ability, was almost as varied and versatile in his talents as was Cicero, while A. H. Garland, in the defense of his right to practice law, demonstrated every quality in the highest and

last degree of the finished trial lawyer, and his dramatic death was a fitting climax to a career covered with patriotism, integrity and honor.

Now having made this running speech for the purpose of making to you suggestions which you yourselves may extend and elaborate, I want to close with the thought that while men, under arms and the flash of swords have won the freedom and liberty of men, it has been the trial lawyers, in the forums of the world, with their souls on fire with the spirit of this freedom and liberty, who have made them concrete things and preserved them to bless our children and our children's children.

CHATTEL MORTGAGES—FORECLOSURE FOR INSECURITY.

WELDGRUBE V. KERNS.

207 PAC. 654.

Supreme Court of Kansas, June 10, 1922.

The rule followed that a chattel mortgagee who in fact deems himself insecure may foreclose regardless of the grounds for such belief, the instrument providing that he may take possession and sell the property if at any time he "shall deem the debt unsafe or insecure."

Wm. K. Ward and James T. Cochran, both of Kansas City, Kan., and Toby Fishman, of Kansas City, Mo., for appellants.

E. L. Eaton, of Bonner Springs, for appellee.

WEST, J. The plaintiff foreclosed a chattel mortgage, and the defendants Nichols and Spiwak appeal and insist that there was no default and that the suit was prematurely brought. Another matter involved is the question of the plaintiff's deeming himself insecure.

The petition alleged that the defendant Kerns gave the plaintiff a note for $3,500 secured by chattel mortgage on the Edwardsville Telephone Exchange. The note was dated February 19, 1919, payable on or before one year after date. The mortgage provided, among other things, that if default be made in payment of the debt or any part thereof, "or if at any time the payee of said note shall deem the said debt unsafe or insecure," he was authorized to take possession and sell the property. A further stipulation was:

"That the undersigned may renew said indebtedness and this mortgage at the maturity thereof at his option, if he shall have paid the interest due thereon, for the period of one year from February 19, 1921, and may, also, under the same condition, at his option, renew said indebtedness and this mortgage further, from year to year, thereafter, but not more than three times after February 19, 1921. * * *"

The petition alleged that the note was past due and that the condition of the mortgage had been broken and the plaintiff deemed the debt insecure and unsafe.

The answer of the defendants Nichols and Spiwak (subsequent owners of the telephone system) alleged, among other things, that the note and mortgage were not due and payable and not in default and that the indebtedness was not unsafe and insecure. It was further alleged that on February 8, 1921, and prior to the beginning of the suit, Kerns paid the plaintiff through its authorized agent, the Farmers' State Bank, $210, "the said amount being received by said bank and duly indorsed on said note, and being the interest due and payable on the said note and mortgage by the terms thereof, from February 19, 1920, to February 19, 1921." Further, that on the date of this payment Kerns elected to exercise the option to renew and did renew for one year and the plaintiff in recognition thereof filed his renewal affidavit.

In reply the plaintiff averred that on or about August, 1920, and prior to January 1, 1921, the defendant Kerns sold the property to Nichols subject to the mortgage and Nichols assumed and agreed to pay the debt, and at the time of the interest payment on February 8, 1921, Kerns was not the owner of the property.

The court rendered judgment for the plaintiff. The errors alleged are: Admitting improper and refusing proper evidence, entering judgment for the plaintiff, and denying a new trial.

The plaintiff testified, among other things, that when the interest was paid in 1920, there was nothing said about a renewal; that he did not know when Kerns sold out and was told nothing about it by Kerns. The defendant Nichols testified that he owned the telephone system February 8, 1921, but had dated the paper back to the first of February because that was when the contract was made between him and Spiwak.

The plaintiff testified that he looked over the telephone lines and they were in poor shape; that he saw Kerns some time in June

and talked to him about the note and mortgage.

"Q. Now, you may state, knowing what you did about the system and Mr. Kerns, and the property he had, what he may have told you whether you deemed yourself and this debt safe and secure. * * * A. I felt unsafe and insecure on account of changing hands, and—"

In their brief counsel say that all the specifications of error are based upon the fundamental proposition that the judgment is in whole or in part contrary to the evidence. They argue that the court erred in finding there was no renewal of the mortgage and its construction of the insecure clause of the contract, and that the evidence showed that the plaintiff did not deem himself insecure.

Whether or not the renewal clause between the plaintiffs and the mortgagor Kerns could be taken advantage of by the defendants to whom the property was sold subject to the mortgage need not be determined at this time.

[1] We do not regard the evidence as showing a renewal of the note and mortgage by the mere payment of interest to the bank, but even if a renewal was made the insecure clause still retained its primary force.

[2] Whatever the views of other courts may be, the rule is settled in this state that, if a chattel mortgagee in fact deems himself insecure, that is the end of all strife, and the grounds thereof cannot be inquired into by other parties. Thorp v. Fleming, 78 Kan. 237, 96 Pac. 470, 19 L. R. A. (N. S.) 915, 130 Am. St. Rep. 366.

While counsel claim there was evidence to show that the plaintiff did not in fact deem the debt insecure, his own evidence, already quoted, was the other way, and the trial court evidently took that view of the matter, and we are bound thereby.

No material error appearing in the record, the judgment is affirmed.

All the Justices concurring.

NOTE—Construction of "Insecurity" Clause in Chattel Mortgage.—In a few jurisdictions it is held that under a clause in a chattel mortgage providing that the mortgagee may take possession of the property if he deems himself insecure, it is immaterial whether the mortgagee has good cause to believe that he is insecure, if he in fact deems himself to be so. Francisco v. Ryan, 54 Ohio St. 307, 43 N. E. 1045.

The weight of authority, however, seems to be that this clause does not vest in the mortgagee any arbitrary power and that he must exercise such power in good faith, with sufficient reason for so doing. Hogan v. Akin, 181 Ill. 448, 55 N. E. 137, reversing 81 Ill. App. 62; Nash v. Larson, 80 Minn. 458, 81 Am. St. Rep. 272, 83 N. W. 451; Feller v. McKillip, 109 Mo. App. 61, 81 S. W. 641; Brown v. Hogan, 49 Neb. 746, 49 N. W. 100; Allen v. Cerny, 68 Neb. 211, 94 N. W. 151; Meyer v. Michaels, 69 Neb. 138, 95 N. W. 63, 97 N. W. 817; Hawver v. Bell, 46 N. Y. S. R. 447, 19 N. Y. Supp. 612, affirmed in 141 N. Y. 140, 36 N. E. 6.

It has been held that the right of the mortgagee to take possession at any time he shall "deem himself insecure" depends upon some act of the mortgagor done or threatened, tending to impair the value of the security Brown v. Hogan, 49 Neb. 746, 69 N. W. 100.

It has even been held that the right of the mortgagee to take possession if he feels insecure "with or without apparent cause" cannot be exercised arbitrarily. Tanton v. Boongaarden, 111 Ill. App. 37.

For cases holding grounds sufficient to justify taking possession by the mortgagee see, O'Neil v. Patterson, 52 Ill. App. 26; McCarthy v. Hetzner, 70 Ill. App. 480; Rosenfield v. Case, 87 Mich. 295, 49 N. W. 630; Stage v. Van Lewven, 77 App. Div. 646, 78 N. Y. Supp. 960; Mathews v. Granger, 66 Ill. App. 121.

For earlier cases on this subject see note in 23 L. R. A. 180.

ITEMS OF PROFESSIONAL INTEREST

RAILROAD STRIKE AS VIOLATIVE OF CLAYTON AND SHERMAN ACTS

Mr. H. R. Small, of St. Louis, District Attorney for the Louisville and Nashville Railroad Company, sends us the following communication from the General Counsel for that railroad:

E. S. Jouett, Vice-President and General Counsel of the Louisville & Nashville Railroad Company on September 7th issued a statement in explanation of the Daugherty injunction issued by Federal Judge Wilkerson, in which he laid down the legal proposition that the Clayton Act supersedes the Sherman Act only in cases between employer and employee and that in a suit by the Government the provisions of the Sherman Act still prevail. Among other things Mr. Jouett said: For 400,000 railroad employees (practically all of the shopmen's crafts) to quit work throughout the whole country simultaneously and by concerted action, and for the purpose, openly avowed, of tying up interstate transportation service until their demands be granted, constitutes a conspiracy in restraint of interstate commerce.

By the Sherman Act of July 2, 1890, Congress declared to be "illegal" every combination or conspiracy in restraint of trade or com-

merce among the several states and made it the duty of the Attorney General "to institute proceedings in equity to prevent and restrain such violations." While any man may lawfully stop working at will, he may not conspire with others to do so if their joint action will interfere with interstate commerce and if he does quit, while he cannot be required to return to work, he can be prevented from doing anything to effectuate the conspiracy.

Under the foregoing clearly established principles, this strike, at its inception, could have been enjoined under the Sherman Act, unless this law has been changed and here the confusion arises. There has been a loose impression in both lay and professional minds that later congressional legislation, known as the Clayton Act, forbids injunctions against quitting work, advising and persuading others to do so, paying strike benefits, etc. This is true in ordinary industrial controversies, but section 20 of that act, the one thus definitely restricting injunctions, is expressly confined to suits "between an employer and employees or between employees or between persons employed and persons seeking employment" and even then only in a case "involving, or growing out, a dispute concerning terms or conditions of employment".

It is too plain for argument that the above provisions of the Clayton Act does not apply to nor affect an injunction in a suit by the United States, because the Government is not included in the class of litigants which the statute specifically enumerates and also because such a suit would not even involve a dispute, since the original "dispute" between the carriers and their employees was settled by the decision of the Labor Board. The provisions then of the Sherman Act, referred to above, remain in full force and the courts still have the power, in case of a strike like this, to enjoin either the initial walkout or any subsequent acts or words of their officers or members by which the continuing conspiracy is maintained.

This involves no interference with the constitutional rights of the individuals but merely forbids any action in furtherance of a conspiracy, which congress has declared is illegal and should be enjoined.

In discussing a similar question the Supreme Court of the United States in 221 U. S. 438, said "To hold that the restraint of trade under the Sherman Anti-Trust Act or under general principles of law could be enjoined, but that the means through which the restraint was accomplished could not be enjoined, would be to render the law impotent".

There are other provisions of the law which authorize this injunction, but the Sherman Act is enough.

LAW DEPARTMENT LOUISVILLE & NASHVILLE RAILROAD CO.

Louisville, Ky.

A GREAT CHINESE LAWYER.

Mr. Basil Matthews, Editor of the Far & Near Press Bureau, sends us the following interesting communication:

Dr. Wang Ching-hui, whose appointment as Minister of Education in the new Chinese Cabinet, has been cabled, is one of the most interesting and promising of the younger intellectual leaders of China.

Only forty years of age this year, he was studying political affairs in Japan during the Boxer rising, and then went to America where he received his D. C. L. at Yale in 1904. During this time he translated the German Civil Code into English, and then went on to England, France and Germany to make a thorough study of jurisprudence and international law, being called to the English bar at the Inner Temple then.

He won his political spurs as assistant to the Chinese representative at the Hague Conference in 1907, and on the Revolution in 1911 he was made Minister for Foreign Affairs to the provisional Government when not yet thirty years old.

Yuan Shih-kai, on forming his government in 1912, made Dr. Wang Minister of Justice. He, however, resigned office on the resignation of the Premier, and became chief editor of a large publishing company in Shanghai.

From 1916 onwards he has done work of epoch marking value as President of the Commission for Codifying the whole law of China.

Dr. Wang, with his brother, Wang Kwong, the manager of the Yangtse Engineering Works (the third greatest industrial concern in China, managed by Chinese), is a son of the late Pastor of the To-Tsai Independent Church, which sprang from the London Missionary Society's work in Shanghai. The two brothers are thus eminent examples of the extraordinary proportion of young educated Christians who are in leading governmental and industrial positions in China.—(Solicitors' Journal.)

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Automobile**—Agency.—Where defendant purchased an automobile to take him and other members of the household to and from their places of work, and, when his son called for him, directed the son to first get the others at their places of employment, the son in doing so was the father's servant or agent acting within the scope of his employment, and the father was liable for his negligence.—Wedge v. Gapinski, Wis., 188 N. W. 476.

2.——County Tax.—By virtue of section 11 of Session Laws of Oklahoma 1915, c. 173, p. 329, providing that 90 per cent. of all moneys received by the department of highways from automobile license tax should be paid to the treasurer of the respective counties in which the individual owners paying such license tax reside, to be used only on the draggable roads of the county, held, that such moneys so received constitute a special fund created for a special purpose, and that the county excise board, in estimating the current needs of the county for the fiscal year, need not deduct such probable income from the estimated needs of the county.—Atchison, T. & S. F. Ry. Co. v. McCurdy, Okla., 207 Pac. 321.

3.——Negligence.—The court may declare as matter of law that it is negligent to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within the distance that objects can be seen ahead of it.—Spencer v. Taylor, Mich., 188 N. W. 461.

4.——Negligence.—Where the driver of an automobile approached a repaired section of a highway coasting the automobile with clutch out, and knowing the condition of the highway and failing to make a turn therein crashed through a guard rail fifty feet beyond the point of repairs and injured a passenger, held, that the passenger's injuries resulted solely from driver's negligence, so as to preclude her recovery against the state.—King v. State, N. Y., 194 N. Y. S. 420.

5.——Sales.—Where plaintiff purchased automobile for $2,500, under a contract in which defendant agreed to accept the return of the automobile on or before a date named for $2,000 net to owner on sale, the word "net" meaning free from charges and deductions, a finding of the jury for plaintiff cannot be disturbed by the court (citing Words and Phrases, Second Series, Net).—Castillo v. J. S. Frank, N. Y., 194 N. Y. S. 418.

6. **Bankruptcy**—Estoppel.—Where newly designated depository of school district made secret arrangement with retiring depository giving the latter time in which to deposit funds, the school district by proving up claim in bankruptcy against the retiring depository for amount of missing funds and accepting and retaining dividends was not estopped from proceeding against the newly designated depository.—Teague Independent School Dist. v. First State Bank, Tex., 241 S. W. 608.

7.——Jurisdiction.—A Delaware corporation had its general office in Kansas City, Mo., where its general books and records, except its stock records, were kept. Its business was the producing and refining of petroleum and sale of its products. It also owned tank cars, which it used and sometimes leased, pipe lines, etc. It owned one refinery, and seven filling stations on leased ground in Kansas City, and some small wells in Kansas; but the greater part of its property and the chief seat of its production and sales were at Ranger, Tex., where it owned and operated wells, two refineries, loading racks, pipe and water lines, and where its bills were paid and most of its sales were made, though larger contracts were submitted for approval to the Kansas City office. Its gross revenue from its business there, exclusive of the production of its Texas wells, was 4½ times as great as that received in Missouri. Held, that its principal place of business, within the meaning of Bankruptcy Act § 2(1), being Comp. St. § 9586(1) was in Texas; and that the court in that district had jurisdiction of proceedings in bankruptcy against it.—Dryden v. Ranger Refining & Pipe Line Co., U. S. C. C. A., 280 Fed. 257.

8.——Ownership.—Merchandise shipped by petitioner to bankrupt to be stored and delivered to petitioner's customers on orders, with the right to bankrupt to purchase such as desired, which was placed by bankrupt in its warehouses with other goods for sale, and from which it made sales, as to that remaining which came into possession of its trustees, held not reclaimable by petitioner under Code Va. 1919, § 5224, providing that, if any person transact business in his own name, without a required designation of agency, all property or stock acquired or used in such business shall as to his creditors be liable for his debts.—Patterson-Sargent Co. v. Rumble, U. S. C. C. A., 280 Fed. 377.

9.——Preference.—Where objections are made to the claim of a creditor on the ground that he has received voidable preferences, it is the duty of the referee to hear evidence in support of such objections, and, if sustained, to disallow the claim as required by Bankruptcy Act, § 57g (Comp. St. § 9641), unless the preferences are surrendered.—Atwood-Larson Co. v. Hasvold, U. S. C. C. A., 280 Fed. 385.

10. **Banks and Banking**—Liable.—Where a vice-president and managing officer of a bank issues a certificate of deposit on the bank upon a numbered form in regular use by such bank, payable to a person or corporation or order, and delivers it to the payee, to pay a personal obligation of the vice-president, the certificate of deposit is a liability of the bank within the meaning of section 18, art. 16, tit. 5, ch. 190, Laws 1919, which requires that liabilities of the bank be reported to the department of trade and commerce, although the bank received no consideration or deposit therefor.—Wentz v. State, Neb. 188 N. W. 467.

11.——Notice.—An officer of a bank may transact his private business at such bank, and may discount third persons' notes, but in so transacting his private business his interest is adverse to that of the bank, and the moment the conflict arises he automatically ceases to represent the bank, and assumes his status as an individual; hence, where the president of a bank obtained notes from his mother-in-law (now deceased) through false representations, or by collateral promises or agreements, and passed them into the bank for value, and converted the proceeds, he did so as an individual, and the bank was not charged with notice of those vices in the paper by reason of his knowledge.—O'Brien v. First State Bank & Trust Co., Tex., 241 S. W. 556.

12.——Preferred Claim.—Where a trust company received a fund as a trustee wrongfully, at a time when it was insolvent, and commingled the fund with its funds, the cestui que trust, having traced the fund into a loan made by the company, which the receiver had collected, was entitled to an allowance for the amount misappropriated and commingled as a preferred claim.—Reserve Loan Life Ins. Co. v. Dulin, Ind., 135 N. E. 590.

13.——Savings Deposits.—Neither the Banking Law provision that no savings bank shall pay any deposit unless depositor's passbook be presented, nor a savings bank by-law to the same effect, is an arbitrary condition, which must be complied with at all hazards.—Dunn v. Seamen's Bank, N. Y., 194 N. Y. S. 416.

14. **Bills and Notes**—Consideration—Purchaser's payment of taxes due on the land, thereby preventing forfeiture for taxes, sale by collector, statutory penalty, and cost of sale under Crawford & Moses' Dig. §§ 10082, 10083, and 10086, held a good consideration for vendor's extension of the time of payment of purchase-money note.—Tallman v. Bennett, Ark., 241 S. W. 362.

15.——Consideration.—Plaintiff loaned defendant $100,000, taking his note for $110,000, under an agreement that $10,000 represented compensation for services, and not as a bonus on the loan. Thereafter a note of $100,000 was substituted for the $110,000. The evidence showed that plaintiff did nothing to earn $10,000. Held, that the note was not usurious, but, inasmuch as the plaintiff performed no services and did not earn the $10,000, the consideration of the $110,000 note to that extent failed.—Farrington v. Steel Co. of America, N. Y., 194 N. Y. S. 537.

16.——Defect on Face.—The fact that the payee named in a note, who failed to indorse it until after maturity, in fact had no interest in the note, does not make the transferee a holder in due course, since the omission of such indorsement was a defect in the title appearing on the note, which put on the taker the duty of making inquiry as to any defenses against the note.—Karsner v. Cooper, Ky., 241 S. W. 346.

17. **Brokers**—Commission.—An agreement between vendor and his sales agent that purchaser should pay the agent half of the commission coming to him, and retain the other half in consideration of the purchaser giving the agent the exclusive right for two years to sell the tract at an agreed commission, was fully performed by both vendor and his agent where the vendor credited purchaser on the price with the full commission due the agent, and purchaser paid the agent the half due him; and it was immaterial as to purchaser's liability for the amount retained on his failure to carry out his agreement with the agent that the agreement between vendor and his agent as to the commission was not in writing.—Mack v. Harnack, Mich., 188 N. W. 502.

18. **Carriers of Passengers**—Damages.—A commutation ticket was made out by the ticket seller of the defendant company in the name of "Mr. L. Letaney" instead of in the name of "Miss Loretta M. Delaney." The ticket was taken up by the conductor of the defendant company when presented for passage by Miss Delaney on the twenty-ninth ride. Held, damages could be recovered for the indignity and humiliation, if any, and, whether so or not, in this case, under the evidence it was a question of fact for the jury.—Delaney v. Erie R. Co., N. J., 117 Atl. 395.

19.——Petition.—In an action for personal injuries to one boarding a car, a count which fails to allege that the car was being operated for the carriage of passengers, that defendant is a common carrier of passengers for hire, or that plaintiff was a passenger or intended to become such, is defective, in that it fails to show a relationship between the parties out of which a duty arose to plaintiff.—Mobile Light & R. Co. v. Ellis, Ala., 92 So. 106.

20.——Regulate Fare.—A carrier has the right to use coupon books for fare, and, in consideration of the reduced rate at which they are sold, to provide that the coupons will not be accepted if detached.—Fort Smith & Van Buren Dist. v. Kidd, Ark., 241 S. W. 374.

21. **Commerce**—Conflict of Laws.—Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, requiring companies engaged in the construction or repair of railroad cars to maintain buildings for such work, is in conflict with the federal Safety Appliance Act April 14, 1910, § 4 (Comp. St. § 8621), requiring defective cars on the lines of interstate carriers to be repaired at the place where they are first discovered to be defective, if feasible, otherwise at the nearest available repair point, and the federal statute is paramount, and controls the state statute in so far as they conflict.—Chicago & N. D. Ry. Co. v. Railroad and W. Commission, U. S. D. C., 280 Fed. 387.

22.——Jurisdiction.—The powers of states to regulate their internal affairs is inherent, and has never been surrendered, but such power is different from the power to create a civil liability in favor of the employees of interstate carriers against their employers for the violation of some police regulation of the state; the power over the interstate carrier being possessed by Congress alone after it once assumed jurisdiction.—St. Louis-San Francisco Ry. Co. v. Conly, Ark., 241 S. W. 365.

23.——Jurisdiction.—Where motion picture producers shipped films to their branch offices, which thereafter leased the films to theaters withins the state and furnished films from the storehouses within the state, theater proprietor's action against producers for conspiracy to ruin his business by refusal to furnish him with films in violation of the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823,

8827-8830) held not within the jurisdiction of the United States District Court; the transactions not involving "interstate commerce."—Binderup v. Pathe Exchange, U. S. C. C. A., 280 Fed. 301.

24. **Constitutional Law**—Public Dancing.—Section 13393, General Code, relating to public dancing without a permit from the mayor of a city or village, is a valid and constitutional enactment.—Rowland v. State, Ohio, 135 N. E. 622.

25.——State Statute.—Since an officer holding a statutory office is removable at the will of the Legislature, due process of law does not require for his removal anything which is not required by statute.—State v. Hedrick, Mo., 241 S. W. 402.

26. **Contracts**—Board and Nursing.—In an action on both express and implied contracts for board, nursing, etc., furnished decedent, an instruction that, if no express contract was found, then there might be a recovery on a contract implied by the circumstances was proper.—In Re Moon's Estate, Mich., 188 N. W. 457.

27. **Corporations**—Consideration.—An agreement by a corporation to pay a stipulated salary to its president and general manager for his services, made as part consideration for the transfer to it of the president's manufacturing business and the license to use his patent, is valid and binding, especially where the stockholders who objected thereto became such after the contract was made and was part of the records of the corporation.—Brictson Mfg. Co. v. Close, U. S. C. C. A., 280 Fed. 297.

28.——Contract.—Where, after the formation of a company, by unanimous vote, a by-law was adopted that no stockholder should have the right to dispose of, except by will, any shares of the capital stock of the company without first offering them for sale to the company at the actual price at which it was proposed to sell or at par in case it was proposed to pledge them, which provision was binding on the legal representatives, printed on the face of every certificate, and binding on each holder, it being mutual and upon sufficient consideration, constituted an executory contract and became binding on the company and the stockholders, when they surrendered their certificates and accepted new ones burdened with the by-law.—Cowles v. Cowles Realty Co., N. Y., 194 N. Y. S. 546.

29.——Duty of Officers.—An unverified statement of the affairs of a corporation, left with a person employed in the county clerk's office who was neither the clerk nor a deputy, is not a sufficient compliance with Crawford & Moses' Dig. §§ 1715, 1725, 1726, requiring the filing of a verified statement annually, and does not relieve the officers from personal liability for the debts of the corporation contracted during the period of default.—Galloway v. Stallings, Ark., 241 S. W. 377.

30.——Entity.—That a majority of the stock in two corporations was held by the same persons and a majority of the directors of each were the same persons did not make them one and the same corporation, and they still remained two distinct legal entities.—Baker v. Bowie Lumber Co., La., 92 So. 129.

31.——Power of Officer.—A corporation, being managed and controlled by the board of directors by virtue of Pub. Acts 1903, No. 232, an officer elected by the board cannot fix his own salary and change it at will; such matter being for the board.—Stevenson v. Sicklesteel Lumber Co., Mich., 188 N. W. 449.

32. **Custom and Usages**—Acceptance.—Where a proposed acceptance modifies an offer, custom and usage of trade cannot be proved to establish the contract.—New York Oversea Co., v. China, Japan & South America Trading Co., N. Y., 194 N. Y. S. 552.

33. **Damages**—Pleading.—In personal injury action an instruction permitting recovery for such sum as would compensate the plaintiff for bodily pain and mental anguish, and for permanent injury, was not reversible error because omitting the word "reasonable" before the word "compensation."—Moore v. Hines, Mo., 241 S. W. 457.

34. **Divorce**—Cruelty.—Evidence that a husband had persistently and maliciously made vile attacks on the character of the wife's daughter by a former marriage and of her sister, and had made such attacks publicly, in the presence of guests, supported by testimony of the wife's physician that such attacks injuriously affected the already impaired health of the wife, is sufficient to sustain a finding that the husband was guilty of cruelty entitling the wife to divorce.—Borda v. Borda, R. I., 117 Atl. 362.

35.——Desertion.—A husband and wife had lived together 28 years and had grown-up children, and, during a quarrel over the conduct of a daughter, in anger, the wife told the husband to "get out," and he left and never returned. In a suit by the husband for divorce on the grounds of desertion, held that his obedience to her outburst was not compulsory, nor was his 2 years' absence from home inevitable, and that her direction in the circumstances was neither justification nor excuse for quitting.—Schmidt v. Schmidt, N. J., 117 Atl. 400.

36. **Electricity**—Franchise.—An ordinance to regulate and control the exercise by Public Service Corporation of an electric franchise to use streets and public places, passed under Pub. Acts 1905, No. 264, held a regulatory ordinance merely, and to contain none of the elements of a franchise, and hence not subject to referendum under Grand Rapids City Charter, tit. 4, § 2.—City of Grand Rapids v. Consumers' Power Co., Mich., 188 N. W. 530.

37. **Eminent Domain**—Title.—A husband entitled to land as a cotenant by entirety with his wife has no interest in such land that can be taken in condemnation proceedings to which his wife was not a party.—Clay County Court v. Baker, Mo., 241 S. W. 447.

38. **Estoppel**—Restrictions.—In an action for an injunction between adjacent landowners growing out of the construction of an apartment building costing approximately $200,000, which under Housing Act, §§ 13, 16, 18, plaintiffs claimed was from 3 to 6 feet too near their boundary, where plaintiffs complained when the construction was begun, but later apparently acquiesced and delayed bringing suit until the building was nearly complete, defendants having proceeded in good faith, relief was denied under the doctrine of laches and equitable estoppel.—Freeman v. McDonough, Mich., 188 N. W. 540.

39. **Explosions** — Contributory Negligence. — A woman who was injured while in her house by rocks thrown upon the house by a blast, which penetrated the roof and the ceiling, is not precluded from recovering for such injuries on the ground of contributory negligence because the house was badly constructed and the roof weak, and because she did not leave the house when the warning of "Fire" was given before the blast was exploded.—Eureka Elkhorn Coal Co. v. Lawson, Ky., 241 S. W. 335.

40. **Husband and Wife**—Agency.—Where a wife executed a note in blank and delivered it to her husband, with authority to fill in the amount of outstanding notes, and the husband exceeded his authority by including also the amount of an overdraft, the wife is liable on the note for the amount of the old notes, especially where there was no showing that the old notes did not represent an indebtedness of her own.—Hannen v. People's State Bank, Ky., 241 S. W. 355.

41. **Insurance**—Application.—Where an insurance policy provided that "no such statement of the insured shall avoid the policy" unless contained in application attached to policy, the words "such statement" necessarily refer to statements previously specified, namely, statements made without fraud; so that fraudulent statements would be a defense although the application was not attached to the policy.—Spaulding v. Mutual Life Ins. Co. of New York, Vt., 117 Atl. 376.

42.——Covenant Broken.—A wife who, in necessary self-defense, killed her husband, could not recover as his beneficiary under a benefit certifi-

cate, which provided that it should be void if insured died at the hands of his beneficiary, "except by accident."—Hutcherson v. Sovereign Camp, W. O. W., Tex., 241 S. W. 516.

43.——Estoppel.—Where insurer notified insured that the attempted forfeiture was had under the terms and conditions of a certain loan agreement, insurer should not be permitted in court to uphold its act on the ground, if true, that it might have enforced a forfeiture under either or both of two other loan instruments.—Widdicombe v. Penn. Mut. Life Ins. Co., Mo., 241 S. W. 437.

44.——Third Party.—Where, in connection with a business transaction between insured and his beneficiary and a third person, the insured and the beneficiary executed a power of attorney to the third party to collect the proceeds of the policy, the execution of the power of attorney was in effect an assignment of the proceeds of the policy to a claim, forbidden by Code Iowa, § 1789, forbidding such assignments where the policy was payable to the wife, and by the by-laws of the insured in accordance with that statute, and the attorney has no equity in the proceeds, where he knew the certificate could not be assigned, and made a profit from the transaction aside from the insurance.—Bankers' Life Co. v. Miller, Mich., 188 N. W. 503.

45. **Intoxicating Liquors**—Petition.—Under the statutory provisions, sections 3, 6, c. 7736, Acts 1918, it is essential to allege in terms or in legal effect that liquors, liquids, or beverages, the possession of which by a defendant is charged to be contrary to the statute, were alcoholic or intoxicating liquors or beverages, though "the particular name, kind, character or contents" of the liquors or beverages need not be alleged.—Hall v. State, Fla., 92 So. 148.

46.——Purpose.—Under Act No. 39 of 1921, prohibiting the sale of intoxicating liquors for beverage purposes, an information charging that defendant willfully and unlawfully sold intoxicating liquors, but not alleging that they were sold for beverage purposes, is insufficient.—State v. Bulloch, La., 92 So. 127.

47. **Landlord and Tenant**—Possession.—That a tenant permitted his landlord to store furniture in the house, and use part of the garage, did not show that he waived the statutory notice to quit and deliver possession, where it appeared, not that he intended to deliver possession in part or in whole, but that such permission was given only as an accommodation.—Phillips v. Gunby, Del., 117 Atl., 383.

48.——Rent.—Under Civ. Code, par. 1646, providing that in actions for recovery of real property the plaintiff may have judgment for the rental value which accrues after judgment and before delivery of possession by motion in the court in which judgment was rendered, in an action by a tenant against a landlord to gain possession of leased premises, where the court found the damage of the tenant from being excluded from possession was $60 per month, and entered judgment for him on that basis for damages to the date of judgment on judgment for the tenant being affirmed on appeal, granting judgment on motion of the tenant for $60 per month damages from the date of judgment to the termination of the lease, which had been extended by a notice of the tenant according to the provisions of the lease, without taking evidence as to the rental value during the period over which the lease was extended, was proper.—Genardini v. Kline, Ariz., 207 Pac. 367.

49. **Master and Servant**—Admission.—In action for injuries to freight conductor, sustained when cars parted on opening of couplers, the mere opening of the couplers held to warrant submission of whether the couplers were defective, in violation of Safety Appliance Act March 2, 1893, § 2 (Comp. St. § 8606).—Philadelphia & R. Ry. Co. v. Eisenhart, U. S. C. C. A., 280 Fed. 271.

50.——Agency.—A messenger boy, furnished by a telegraph company on plaintiff's request and for consideration paid, who received from plaintff a coat to deliver to a named person at a designated street address, and who delivered it to a wrong person, held the servant of the plaintiff for the delivery of the parcel, and not the servant of the company, because as to such service the boy was under plaintiff's control and direction, and therefore the company was not liable under the doctrine of respondent superior.—Biasi v. Western Union Telegraph Co., N. Y., 194 N. Y. S. 429.

51.——Assumption of Risk.—Brakeman on an interstate railroad did not have the duty imposed on him to inspect steps on an engine, and could not, under the federal statute, be charged with assumption of risk of an insecure or unsafe step, notwithstanding rules of the railroad admonishing him to take no risks.—Davis v. Reynolds, U. S. C. C. A., 280 Fed. 363.

52.——Defined.—The federal Safety Appliance Act (U. S. Comp. St. § 8605 et seq.) does not extend to hatch handles on refrigerator cars.—Perkins v. Great Northern Ry. Co., Minn., 188 N. W. 564.

53.——Liability of Master.—Where an employer undertakes to do work upon the premises of another, he must exercise the same degree of care for the safety of his employees that the law demands where the work was done on his own premises.—Billings v. Williams, Tex., 241 S. W. 528.

54.——Respondeat Superior.—Where an automobile driver directed by his employer to deliver a box at a cemetery did not return to the garage after delivery, but started in the opposite direction on a personal errand taking relatives with him and had gone beyond the limits of the city and was well on his way to a farm three miles distant when the accident occurred, he as a matter of law was not acting within the scope of his authority, and the rule of respondeat superior did not apply.—Ursch v. Heier, Mo., 241 S. W. 439.

55. **Municipal Corporations**—Agency.—Where a municipal corporation has a right and power to enter into a given contract, it can legalize it after it has been performed under an authority of its unauthorized agents and convert the money so earned into a legal debt.—Mercer County v. Tobish, N. J., 117 Atl. 392.

56.——Common Carriers.—Though the use of city streets for general transportation and traffic are free and common to all, a taxicab owner has no inherent right to use the streets for conducting his business as a common carrier, without the consent of the city, and the city, therefore, can impose restrictions on the use by taxicabs which it cannot impose on the use by the general public.—Melconian v. City of Grand Rapids, Mich., 188 N. W. 521.

57.——Nuisance.—Under city ordinances requiring permission of city authorities to make openings below the surface of a street, where defendants maintained a coal hole in a sidewalk without authority, they were guilty of maintaining a public nuisance, and were liable to a person injured thereby, regardless of contributory negligence on his part.—Dietze v. Frank Hillman Realty Co., N. Y., 194 N. Y. S. 412.

58.——Pedestrian.—The rule of reasonable care does not impose upon the pedestrian in the use of public streets and sidewalks a constant vigilance to discover and guard against defects therein; he may assume that they are in proper and safe condition and direct his attention in part to other dangers naturally to be anticipated and guarded against.—Bowen v. City of St. Paul, Minn., 188 N. W. 554.

59.——Right of Way.—An ordinance declaring all vehicles going easterly or westerly shall have right of way over all vehicles going northerly or southerly, applies only where vehicles approach a street intersection at approximately the same time and under such circumstances as to make it reasonably necessary that one yield the right of way to the others.—Petring v. Albers, Mo., 241 S. W. 452.

60. **Principal and Agent**—Implied.—The mere fact that a party has at times honored the drafts of another party is not alone sufficient to constitute such other party his agent.—Cupples et al. v. Stanfield, Idaho, 207 Pac. 326.

61.——Ratification.—Where the payee of a check bearing the notation, "Cash payment for 640 acres of land," indorsed it without knowing that it had been given to pay for land sold to the makers by his indorsee, acting without authority as his agent, he did not thereby ratify the contract, having received none of the proceeds of the check.—Watson v. Woodley, Colo., 207 Pac. 335.

62. **Railroads** — Contributory Negligence. — Defendant was entitled to have given its requested instruction that, if plaintiff stopped his automobile upon the track or so close thereto that a passing train could not clear it, for the purpose of picking up a supposed intended passenger, when an approaching train was only 60 feet away, he was guilty of contributory negligence where the evidence established the facts stated in the instruction, notwithstanding plaintiff's claim he did not see the train, which he should have seen since it was in plain view.—Fitch v. New York Cent. R. Co., N. Y., 135 N. E. 598.

63.——Private Carriers.—The provisions of section 4058 of the Code of 1906 (section 6686 of Hemingway's Code), providing statutory penalties for failure of a railroad company to construct necessary plantation roads and cattle guards or stock gaps, apply to the ordinary railroads carrying persons or property for hire, and are not applicable to logging roads privately operated by lumber companies or private persons.—New Deemer Mfg. Co. v. Kilpatrick, Miss., 92 So. 71.

64.——Signals.—The failure of the railroad to give any signal of the approach of a train is a circumstance which the jury has right to consider in determining whether a traveler injured at a crossing exercised the proper degree of care.—Payne v. Vise, Ind., 135 N. E. 585.

65. **Sales**—Acceptance.—Whether the taking by defendant of a few bags from a carload of 50,000 shipped by plaintiff under a contract of sale, constituted an acceptance which bound defendant to take all, may depend on the intent with which they were taken, and where the shipment was made to a point remote from where defendant, a corporation, was located, and the bags were taken from the car by its agent for samples, as was claimed, and sent to defendant during negotiations as to acceptance, an instruction that such taking was an acceptance as matter of law held erroneous.—Charles F. Murphey Co. v. Fulton Bag & Cotton Mills, U. S. C. C. A., 280 Fed. 367.

66.——Delivery.—Where a complaint is to recover the value of goods, wares and merchandise alleged to have been sold and delivered, and the answer denies that plaintiffs "sold and delivered" such goods, wares, and merchandise, the use of the word "sold" includes a delivery, and a denial, although in the conjunctive, raises an issue both as to sale and delivery.—Cupples v. Zupan, Idaho, 207 Pac. 328.

67.——Guaranty.—Even though a buyer may have had until spring to test a tractor to ascertain its conformity to guaranty, he could not rescind his contract in the spring if he knew, in the fall before, that the tractor did not conform to the guaranty.—Pratt-Gilbert Co. v. Hildreth, Ariz., 207 Pac. 364.

68.——Right to Rescind.—The buyer has no right to rescind, or refuse to perform, a contract for the purchase of a quantity of flour on the ground that a shipment of the same brand, made under a separate contract between the same parties, had proved unfit for use, particularly where earlier shipments had been satisfactory.—Rock v. Gaede, Kan., 207 Pac. 323.

69.——Warranty.—Where failure of a fan to operate three boilers at a certain rating did not render the maker liable for breach of warranty in absence of information in the specifications as to the size of the boilers to be used, unsuccessful gratuitous attempts by the maker to remedy the fan could not subject him to liability.—Bayley Mfg. Co. v. Bowers, Wis., 188 N. W. 481.

70. **Street Railroads**—Crossings.—Pub. Acts 1893, No 171, § 5, authorizing the commissioner of railroads to apportion the expense of maintaining existing crossings between the companies affected, applies only to crossings existing at the time of the enactment of the statute—Pere Marquette Ry. Co. v. Michigan Public Utilities Com'n, Mich., 188 N. W. 515.

71. **Telegraphs and Telephones**—Torts.—A telegraph company is not liable for acts of its former employees while engaged under government contral in the operation of its property.—American Telephone & Telegraph Co. v. Spring, U. S. C. C. A., 280 Fed. 386.

72. **Vendor and Purchaser**—Possession.—Where vendor covenants to give possession on a certain date, the purchaser is not put on inquiry and called at his peril to exercise diligence by reason of the property being occupied to his knowledge; he having a right to assume that vendor could and would give possession according to the terms of the contract.—Sanders v. Detlaff, Mich., 188 N. W. 446.

73.——Title.—As between vendor and vendee of real estate, the encroachment by part of a dilapidated frame shed, standing on the premises to be conveyed, over the property line of the extent of about 4 inches held not a substantial defect in title.—Scheinman v. Bloch, N. J., 117 Atl. 389.

74. **Waters and Water Courses**—Owner.—Mere ownership of lots on a canal, between it and a river which it parallels, gives the lot owner no right to take water therefrom for power.—Stebbins v. Frisbie & Stansfield Knitting Co., N. Y., 194 N. Y. S. 559.

75. **Wills**—Conveyance.—Since a power to convey creates in the donee no right, title, or interest in the premises to be conveyed, a deed from a life tenant in the ordinary quitclaim form, purporting to convey not the land, but all her right, title, and interest therein, conveys only her life estate, in the absence of anything in the deed indicating that she intended to exercise a power to sell the fee.—Barnard v. Moore, Colo., 207 Pac. 332.

76. **Workmen's Compensation**—Accident.—That a workman's disability from an attack of appendicitis, following a wrenching and jerking, may have resulted from the accidental aggravation of a chronic ailment, and that he may have been predisposed because of disease to that form of attack, have nothing to do with the question whether what befell him is to be regarded as an "accident," within the Workmen's Compensation Act (Comp. Laws 1915, §§ 5423-5495).—Fritz v. Rudy Furnace Co., Mich., 188 N. W. 528.

77.——Fixed Time.—In view of Or. L. § 6632, subd. "d," declaring that no claim for workmen's compensation shall be enforceable unless filed within a certain period "after the date upon which the injury occurred" and section 6626, allowing compensation for personal injury by "accident caused by violent or external means" recovery can be had only for injuries referable to a certain fixed time not for occupational diseases.—Lough v. State Industrial Accident Commission, Ore., 207 Pac. 354.

78.——Negligence.—Under Workmen's Compensation Act, pt. 3, § 15 (Comp Laws 1915, § 5468), giving employer who has paid compensation the right to recover against third person where the injury was caused under circumstances "creating a legal liability" in such third person, the "legal liability" arises where such third person is guilty of negligence, and unless a legal lability for negligence is estabished the employer cannot recover.—Grand Rapids Bedding Co. v. Grand Rapids F. Temple Co., Mich., 188 N. W. 538.